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No. 92-1665

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MAPCO AMMONIA PIPELINE, INC., *et al.*,
Petitioners,

v.

STATE BOARD OF EQUALIZATION AND ASSESSMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Nebraska Supreme Court

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REPLY BRIEF FOR PETITIONERS

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We demonstrated in the petition that, by refusing to remedy the inequality resulting from an unlawfully discriminatory property tax statute, the Nebraska Supreme Court clearly misapplied the due process requirements set out in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Tacitly acknowledging this point, respondents principally argue—in direct contradiction to the decision below—that *McKesson* has no applicability here. They also make the obligatory nod in the direction of justifying the Nebraska Supreme Court's decision as written. Neither effort provides any basis for denying the petition.[1]

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[1] Although the State respondents and the local government respondents have filed separate oppositions, their arguments are largely identical. We will generally cite the State's arguments in our reply, while referring to "respondents" collectively, except when only one respondent makes an argument.

1. Reversing the order in respondents' oppositions, we begin by addressing their argument concerning the application of *McKesson*: that is the case, after all, that the Nebraska Supreme Court purported to apply. Respondents offer not a shred of reasoning or analysis to rebut our core argument that *McKesson* requires unlawful tax discrimination to be remedied retroactively, by equalizing the *actual* taxes paid by favored and disfavored taxpayers—either through a refund to disfavored taxpayers, a retroactive tax increase on favored taxpayers, or some combination of the two. *See* Pet. at 7-8. Indeed, the only authority cited by the State to support its contrary reading of *McKesson* agrees with our position. Thus, the State quotes from Justice Stevens' dissent in *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 206 n.2 (1990), to the effect that *McKesson* "does not *require* the State to refund the entire tax that was unconstitutionally exacted from petitioners, *but only to refund the discriminatory portion or otherwise adjust the tax to render it non-discriminatory*." State Opp'n at 13 (second emphasis added). That straightforward requirement was not followed here. The "remedy" approved by the Nebraska Supreme Court did *not* make the tax non-discriminatory; rather it perpetuated (even if it slightly lessened) the unlawful discrimination between petitioners' taxes, which, after the remedy, still remained substantial, and the comparable "tax" on railorads, which, after the remedy, still remained at zero. That discriminatory result cannot be squared with *McKesson*.[2]

2. Obviously unable to defend the Nebraska Supreme Court's application of *McKesson*, respondents attempt

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[2] The local respondents incorrectly assert that *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928), upheld a "comparable" remedy. Local Resp'ts Opp'n at 7. That case held that a *full* refund was required, expressly stating that the State must "bring about an equality" to remedy the discrimination caused by an unlawful tax.

mightily to argue that *McKesson* is inapposite, offering four grounds for distinguishing it. Three of those arguments were not even raised below and thus cannot properly be relied on here. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (citing *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). All four arguments are meritless.

a. Respondents first suggest that *McKesson* does not apply here because Nebraska law did not require petitioners to "pay first and obtain review of the tax's validity later." *McKesson*, 496 U.S. at 22. That argument was not presented below and is flatly wrong. Indeed, respondents never say otherwise, but instead talk vaguely around the issue—in a transparent effort to confuse, not clarify, it. The simple truth is that petitioners could not have prevented the State from collecting their taxes, which is the kind of *pre*deprivation remedy that is necessary to take a tax challenge outside the remedial strictures of *McKesson*. *See* pp. 4-5, *infra*. In fact, Nebraska law affirmatively *bars* an injunction against tax collection, except in one narrow circumstance: when the tax is "levied or assessed for [an] *illegal or unauthorized purpose*." Neb. Rev. Stat § 77-1727 (Reissue 1990) (emphasis added). The property tax levied on petitioners, quite plainly, was not for such a proscribed purpose. Respondents do not, because they cannot, claim otherwise. The legal flaw in the tax was that it was discriminatory. That kind of challenge is indisputably not subject to a predeprivation remedy in Nebraska.[3]

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[3] The State also cites Neb. Rev. Stat. §§ 77-1735 and 77-1736.04 (Reissue 1990) as potential alternative remedies. But these provisions, as the State itself acknowledges, here would authorize only "refund actions" (State Opp'n at 7), and thus do not render *McKesson* inapplicable. In any event, section 77-1735 would have required multiple (county-by-county) litigation and only applies to taxes levied for an "unauthorized purpose," which is not this tax; and section 77-1736.04 is, in fact, part of the remedial option properly pursued by petitioners.

b. Respondents' second argument, also not raised below, is that "unlike *McKesson*, the State Court did not hold that the taxes imposed on Petitioners' property were unconstitutional. Rather, the State Court held that various exemptions provided under Nebraska law were unconstitutional . . . ." State Opp'n at 7. This argument rests on an obvious misunderstanding of *McKesson* in particular, and the nature of discrimination claims, in general. The flaw in the excise tax at issue in *McKesson* —exactly like the flaw in the property tax at issue here— is the State's failure to treat two groups of taxpayers equally. When such discrimination occurs, it makes no sense to say, as the State does, that the tax is lawful, but the exemption is unlawful. Rather, it is the *distinction* between the two groups that is unlawful; and the remedy for such a distinction, as *McKesson* held, is retroactive equality in terms of taxes actually paid. *See McKesson*, 496 U.S. at 38-41 (distinguishing between taxes that are discriminatory and taxes that are beyond the State's power to impose).[4]

c. In the one diversionary argument that they did raise below, petitioners attempt to limit *McKesson* to Commerce Clause cases. As we demonstrated in the petition, however, *McKesson*'s remedial requirement is based on the due process clause and grows out of the unique post-deprivation remedial approach that States

[4] Respondents rely on *Bade v. Drachman*, 417 P.2d 689, 697 (Ariz. Ct App. 1966), and *Siegal v. Newark*, 183 A.2d 21, 23 (N.J. 1962), to support their misguided argument. State Opp'n at 8. Not surprisingly, the cases are inapposite; they involve property that is overassessed by the tax assessor, whose valuation is successfully challenged, which then necessitates a remedy that lowers the assessment to an appropriate level, based on what other taxpayers actually paid. The only dispute in those cases is which taxpayers are comparable, for assessment purposes, to the successful plaintiffs. Here, the comparable taxpayers, as the Nebraska Supreme Court held in *MAPCO I*, are the railroads, which pay nothing. In any event, neither of the cases relied on by respondents even raises a federal due process issue.

typically follow in tax cases. Pet. at 7, 9 n.4. In the absence of a meaningful predeprivation remedy, of course, there is no way to ensure that a discriminatory tax is equalized *before* it is imposed. Consequently, a post-deprivation remedy, if it is to adequately correct this timing problem, requires *retroactive* equality in actual taxes paid. *See McKesson,* 496 U.S. at 43 (constitutionally adequate remedy must "bring about the *nondiscrimination* that 'prompt injunctive relief would have achieved' ") (quoting Br. for Resp'ts on Rearg. at 15). That is as self-evidently true for non-Commerce Clause discrimination claims as it is for Commerce Clause discrimination claims.[5]

d. Finally, the State argues, again for the first time in this Court, that the remedy approved below properly takes into account " 'reliance interests [of the State] entitled to consideration.' " State Opp'n at 10 (quoting *James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439, 2448 (1991) (opinion of Souter, J., joined by Stevens, J.)). Whatever the legitimate scope of such reliance interests—an issue not touched on in Justice Souter's opinion, much less in the opinions for the other seven Justices—they have no force here. The discriminatory distinction between railroad property and pipeline property, which was invalidated in this case, was enacted by the Nebraska legislature *after* the State Supreme Court had already held

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[5] In support of their proposed Commerce Clause limitation on *McKesson,* respondents cite *Bohn v. Waddell,* 807 P.2d 1, 8 (Ariz. Tax 1991), *vacated on other grounds sub nom. Estate of Bohn v. Waddell,* 848 P.2d 324 (Ariz. Ct. App. 1992). The decision is minimally relevant, at best: it hopelessly confuses the remedial thrust of *McKesson* with the separate question of retroactivity; and the appellate court expressly refused to address the remedy issue at all, concluding instead that the plaintiffs had failed to exhaust necessary administrative remedies. It is from that exhaustion ruling that a petition is now pending in this Court in No. 92-1748. Moreover, to the extent that there is language in the lower court opinion in *Waddell* suggesting that *McKesson* only applies to Commerce Clause cases, such language is incorrect.

that this kind of discrimination between the railroads and pipelines was unlawful. See *Northern Natural Gas Co. v. State Bd. of Equalization*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990); *Natural Gas Pipeline Co. v. State Bd. of Equalization*, 466 N.W.2d 461 (Neb. 1991).[6] The Nebraska legislature's recalcitrance undermines any potential equitable argument based on *legitimate* reliance interests.[7]

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[6] The State points out that the Nebraska Supreme Court also invalidated several other statutory exemptions, *sua sponte*, and, in so doing, "overturned [an earlier] 1974 decision." State Opp'n at 10-11. But, as the court's opinion makes clear, that part of its decision was not the basis for invalidating the tax on petitioners. Indeed, the tax on petitioners had previously been struck down in *Natural Gas Pipeline*, without any consideration of the additional exemptions. The significance of the court's decision to invalidate the additional exemptions in the present case is that it would have allowed a retroactive tax on all exempted property, including that of the railroads, which could have satisfied the *McKesson* requirement. The State Board, however, declined to follow that option on remand.

[7] For essentially the same reason, the State's half-hearted suggestion that *MAPCO I* should not have been given retroactive effect—again, a position that it did not raise below and which actually *contradicts* the judgment below—is meritless.